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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION

17 CISCO SYSTEMS, INC.,

18 Plaintiff,

19 v.

20 ARISTA NETWORKS, INC.,

21 Defendant.
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Case No. 5:14-cv-05344-BLF (NC)

**ARISTA'S BRIEF RE ARGUMENT AND
EVIDENCE REGARDING SPECIFIC
CISCO PRODUCTS**

Dept.: Courtroom 3 - 5th Floor
Judge: Hon. Beth Labson Freeman

Date Filed: December 5, 2014

Trial Date: November 21, 2016

1 Earlier today, Cisco's counsel cross-examined Arista's expert John Black on the subject of
2 the number of CLI commands in a particular Cisco product—the Nexus 7000. Cisco asked Dr.
3 Black about Pradeep Kathail's testimony that the manuals for a Nexus 7000 switch have 1500
4 CLI commands in them. It is now clear that Cisco intends to spin its objectionable questioning of
5 Mr. Kathail into a closing argument that Arista copied a substantial portion of the total CLI
6 commands that were present in the Nexus 7000, which Cisco will claim was a competing switch
7 to Arista's products. Arista objects that such argument and evidence is irrelevant and was not
8 disclosed in discovery.

9 Over Arista's objection, Mr. Kathail testified as to his purported count of the total number
10 of commands listed in manuals related to the Nexus 7000 switch. *See* Exhibit A (11/30/2016 Tr.)
11 at 1070. At sidebar, the Court overruled the objection based upon Cisco's counsel's
12 representation that the evidence is relevant "with respect to fair use" (*id.* at 1069) because it
13 shows that "qualitatively they [Arista] took the commands that correspond to the specific
14 products they sell." *Id.* at 1066:22-23. Because neither this contention nor this evidence was
15 disclosed during discovery, and because it is not relevant to any issue in this case given the
16 Court's and Cisco's definition of the works at issue, Cisco should be barred from making any
17 argument to the jury based on Mr. Kathail's evidence and from presenting any further evidence
18 about the number of commands (or other CLI elements) related to the Nexus 7000 or any other
19 specific models or types of products.

20 Cisco never disclosed any such contention or evidence in discovery, despite Arista's
21 interrogatory that directly asked for all facts supporting Cisco's contention that Arista's use was
22 not fair. Arista's Interrogatory No. 21 asked Cisco to "[i]dentify and describe in detail the factual
23 and legal bases . . . for your contention that Arista's alleged use of the asserted aspects of the
24 copyrighted works does not constitute a "fair use" under 17 U.S.C. § 107, including all facts you
25 contend are relevant to each of the following statutory factors," which were all listed in the
26 interrogatory. *See* Exhibit B (Cisco's 6/3/2016 Corrected Supp. Interrogatory Responses) at 5. In
27 response, specifically addressing the third element of the statutory inquiry ("the amount and
28 substantiality of the portion used in relation to the copyrighted work as a whole"), Cisco made no

1 mention of any argument premised on the significance of the portion used by reference to
 2 particular Cisco products such as the Nexus 7000. *Id.* at 15-17. Nor did Cisco even suggest that
 3 some fraction of all CLI commands that are recognized by any one of the asserted works should
 4 be the test for the third factor, much less identify that number. *Id.* Cisco failed to disclose the
 5 facts to which Mr. Kathail testified or anything similar, and it failed to identify any product-based
 6 arguments at all against fair use. Cisco cannot be permitted to make such an argument now, given
 7 its failure to disclose this information in discovery. FRCP 37(c).

8 Cisco's reliance now on contentions and evidence that were never disclosed is prejudicial
 9 to Arista (especially in light of the cross-examination of Dr. Black on this subject to the effect
 10 that he could not dispute Mr. Kathail's claim) because neither Arista nor Dr. Black have had an
 11 opportunity to investigate the claim that the Nexus 7000 contains only 1,500 CLI commands.
 12 Indeed, on the stand, Dr. Black was skeptical that the Nexus 7000 contains only that many
 13 commands, but since he had no opportunity to investigate the claim until Mr. Kathail—a lay
 14 witness—made the claim at trial, he was unable to respond in full.¹

15 Furthermore, the question of how many commands are recognized by a Nexus 7000 is
 16 irrelevant because the Court has ruled that the relevant works in this case are the entire user
 17 interfaces for each of four Cisco operating systems—not any narrower subset of those interfaces
 18 limited to or defined by particular products or functions. Given this definition of the copyrighted
 19 works, evidence about the number of commands or other CLI elements associated with any
 20 particular product (or identified in a manual for such a product) is not relevant to any issue before
 21 the jury. FRE 401. There is no authority that suggests the jury should consider the allegedly
 22 copied material in relation to some non-copyrighted (and non-copyrightable) product as opposed
 23 to the “work” in question. Like infringement, the third factor of the fair use analysis also
 24 addresses of the substantiality of the use in relation to the “copyrighted work as a whole”—

25 ¹ Cisco apparently knew it would one day make this argument, since its expert appears to have
 26 dropped a brief placeholder for the argument in his rebuttal expert report, served after any Cisco
 27 expert could have an opportunity to respond, and long after Arista could propound new
 28 interrogatories, take depositions on this subject, or issue new requests for documents. The
 cursory mention in the rebuttal report provided no detail and cannot be characterized as sufficient
 disclosure under Rules 26 and 37. Exhibit C (Almeroth Rebuttal Rpt.) ¶¶ 151-52 (claiming
 “[w]hat is relevant are the works related to Ethernet switches/routers.”).

1 namely Cisco's entire interface, not a portion of it related to any product. 17 U.S.C. § 107(3);
 2 *Oracle America, Inc. v. Google, Inc.*, 750 F.3d 1339, 1374 (Fed. Cir. 2014) ("The third factor
 3 asks the court to examine 'the amount and substantiality of the portion used in relation to the
 4 copyrighted work as a whole.'"). Nor does this evidence fall within the "qualitative" assessment
 5 under the third fair use factor, since Mr. Kathail provided no evidence linking any of the allegedly
 6 copied commands to the 1500-command count he presented in court. There is simply an
 7 untethered number in the evidence, which Cisco doubtless wants to argue somehow makes the
 8 500 asserted commands seem more important. But the law is clear that comparing the numerical
 9 count is legally improper since a Nexus 7000 switch is not a work. And using the 1500-command
 10 count as a proxy for qualitative importance is not proper because neither Mr. Kathail nor any
 11 other witness linked the 1500 to the asserted commands. For the same reasons, further evidence
 12 or argument on this topic raises a substantial risk of jury confusion about the proper analysis
 13 under fair use. FRE 403. Any argument based on such evidence, like the evidence itself, is
 14 improper and prejudicial because it risks decision on an improper basis (*i.e.* based on a false
 15 suggestion that the scope of the asserted work as a whole is much narrower than the actual
 16 asserted work).

17 Accordingly, Cisco should not be permitted to present any argument or further evidence to
 18 the jury about Mr. Kathail's testimony or about the number of commands or other CLI features
 19 that relate to an undisclosed subset of Cisco or Arista products.

20 Respectfully submitted,

21 Dated: December 7, 2016

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24 Attorneys for Defendant
 25 ARISTA NETWORKS, INC.